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In the Supreme Court of the United States

No. 78-350

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

vs.

CANADIAN AMERICAN OIL COMPANY, and FREDERICK M. TAUTENHAHN, Partners dba FREDERICK M. TAUTENHAHN—CANADIAN AMERICAN OIL COMPANY,
Respondents.

Petitioner's Reply Brief

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

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SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petitioner's Reply Brief

Respondents' brief in opposition emphasizes why the petition should be granted by sharpening the question presented.

The supposed proposition of law which respondents submit as sustaining the decision below can be summed up so:

> In a case of conduct of a kind which would be a *per se* violation of the Sherman Act *if* the requisite element of interstate commerce were satisfied, that element is satisfied by the mere fact that the party whose conduct is assailed engages in interstate commerce, although the conduct neither is in interstate commerce nor affects interstate commerce but is an isolated, atypical event, local, unique, and not characteristic of the party's general mode of operation.

The district court stated (App. to Pet., p. 19) that jurisdiction is a factual issue "that must be determined on a case-by-case basis" and that "a review of the facts, conceded and undisputed for this motion, fails to support federal jurisdiction under either the 'in-the-flow of' or the 'substantial-effect-on' commerce theories." The Court of Appeals did not differ on the facts; it went off on the view that, *as a matter of law,* if only the company is a large

company "engaged in interstate commerce", withholding of any benefit from any dealer because he ignores pricing instructions is in or affects interstate commerce no matter how unique that benefit may be.*

Respondents' opposition states the proposition in all its starkness. In *Noble v. McClatchy Newspapers,* 533 F. 2d 1081 (9 Cir. 1975) the very court below held that it was error to refuse an instruction to the jury reading that if a restraint of trade is of a type which is unreasonable *per se,* it is "unnecessary for plaintiff to prove that there has been a restraint of interstate trade and commerce as a result of such restriction—it is presumed." This Court granted certiorari in that case, *McClatchy Newspapers, et al. v. Noble, et al.,* 433 U.S. 904 (1977), upon a petition in which one of the three questions presented read thus:

> "Does the fact that a restraint of trade is of a type which is unreasonable *per se* dispense with the necessity that it be either in or affect interstate commerce in order that the Sherman Act apply? The court below held that it did."

However, the Court's order granting the petition simultaneously reversed the judgment of the court below and remanded the case for further consideration in the light of the decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977). Because the court below then directed judgment for the petitioner McClatchy Newspapers, Inc., on the basis of the *Sylvania* decision, the question quoted above was mooted there.

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*Respondents refer to Union's method of selling gasoline as interstate and as a "storage and purchase program", a term not found in either opinion below. That method has been held to be legal, in former litigation conducted by respondents' counsel, *Peters v. Union Oil Company,* 328 F. Supp. 998 (C.D. Cal. 1974), and it is *not* the conduct which either court below thought would violate the Sherman Act if the element of interstate commerce were present. The supposed illegalizing fact here was something else, *viz.,* refusal to sell to a particular dealer. It is to be added that while, solely for the purposes of its motion, Union "conceded many facts" (opinion of district court), it has not conceded that those facts would constitute a violation of the Sherman Act, *per se* or otherwise, were the element of interstate commerce present.

It now returns, as respondent presents the issue. It has long been elementary that the Sherman Act is not implicated unless two elements conjoin:

(1) There is a restraint of trade which is unreasonable either because (a) it is unreasonable in fact or (b) it is deemed unreasonable *per se,* and

(2) the restraint is either in or has a substantial adverse effect on interstate commerce. *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186 (1974); *United States v. American Building Maintenance Industries,* 422 U.S. 271 (1975); *Hospital Building Co. v. Rex Hospital Trustees,* 425 U.S. 738 (1976).

The rule of the court below in the *McClatchy* case assigned to a *per se* situation a double office, the first, to assign unreasonableness to the restraint, the second, to usurp the requirement of commerce. That is not the law as applied by this Court. As recently as *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), a *per se* price-fixing case, the Court stated the issues, as follows (421 U.S. at 780):

> "Our inquiry can be divided into four steps: did respondents engage in price fixing? If so, are their activities in interstate commerce or do they affect interstate commerce?"

Perhaps respondent adds another element to the proposition *viz.,* that the accused party is one that engages in interstate commerce. But this makes the identity of the accused party, rather than the nature of the conduct as being in or affecting interstate commerce, the test of whether the Sherman Act applies.

CONCLUSION

We respectfully submit that the proposition is wrong, and that the petition should be granted to allow no entry for it into Sherman Act jurisprudence.

Dated, San Francisco, California, September 27, 1978.

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Attorney for Petitioner